HARVARD

LAW REVIEW.

VOL. XIII. APRIL, 1900. NO. 8

CONSTITUTIONAL REGULATION OF CONTEMPT OF COURT.[1]

THE extension of the sphere of equitable relief by injunction, to meet new phases of interference with rights of persons and property evolved in "labor" controversies, has led to a great deal of alarmist criticism. While the writer does not believe that the courts have gone further than to apply well-settled principles to novel exigencies of civilization, he recognizes the sincerity and conscientiousness of some lawyers in their contention that there has been judicial usurpation of executive and legislative prerogatives which threatened constitutional liberty. Unfortunately, the cant phrase "government by injunction" has proved a very taking shibboleth in the mouths of demagogues, who would rally political sentiment for their own selfish ends under pretence of organizing to resist the growing tyranny of the courts. There has been so much comment that was soberly apprehensive, and so much more that was merely hysterical, that it may be taken for granted that the professional, as well as the lay, mind is now thoroughly alert to the evil tendency, if any, of judicial "expansion." The time, therefore, seems opportune for calling attention to a counter tendency, which beyond doubt exists, and, in the judgment of the

[1] This paper was read on January 17, 1900, before the New York State Bar Association.

writer, is much more subversive of the integrity of our institutions. There is a constant and unmistakable disposition on the part of legislatures to invade the judicial province, and arrogate control of the exercise of judicial functions. A similar spirit in a less marked degree is wont to actuate executives, and here, unfortunately, well-settled principles of law make the authority to nullify judicial acts very clear.

Professor Woodrow Wilson has observed that "the natural, the inevitable tendency of every system of self-government like our own and the British is to exalt the representative body, the people's parliament, to a position of absolute supremacy. That tendency has, I think, been quite as marked in our own constitutional history as in that of any other country, though its power has been to some extent neutralized, and its progress in great part stayed, by those denials of that supremacy which we respect because they are writen in our law." [1] In no particular has the legislative trend towards absolutism struck more vitally at the constitutional theory of three independent governmental departments than in the assumption to prescribe and regulate the power to punish for contempt of court. A court without a sheriff, and shorn of the right to enforce its mandates by contempt process, would be merely a debating society. The matter of fixing the general duties and powers of the sheriff already rests in the legislature. The courts of several states have realized that self-preservation demands the resistance of every legislative encroachment upon the historical judicial prerogative of inflicting penalties for contempt. The cases upon the subject are quite numerous, but it will be sufficient to cite three of the best considered of them: *In re* Shortridge, in the Supreme Court of California; [2] State *v.* Morrill, in the Supreme Court of Arkansas; [3] and Carter *v.* Commonwealth, in the Supreme Court of Virginia.[4] The following language from the opinion in State *v.* Morrill (*supra*) may be taken as a typical judicial utterance: —

"The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and state institutions, and a favorite theory in the government of the American people.

[1] Congressional Government, p. 311.
[2] 34 Pac. Rep. 227.
[3] 16 Ark. 384.
[4] 32 S. C. 780.

"As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the '*acts*' therein enumerated, it is merely declaratory of what the law was before its passage. The *prohibitory* feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature, that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect, but to say that it is absolutely binding upon the courts, would be to concede that the courts have no constitutlonal and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt."

The Constitution of the United States[1] provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish." The constitutions of California and Arkansas contain similar provisions expressly vesting "the judicial power." The constitution of Virginia provides: "There shall be a Supreme Court of Appeals, Circuit Courts, and County Courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law." Under this clause the Supreme Court of Appeals of Virginia has within a year past upheld the inherent judicial power to summarily punish for contempt as stiffly and radically as the courts of California and Arkansas.[2] It was expressly laid down in the Virginia case that the power is necessarily resident in, and to be exercised by, the court itself, and that a statute assuming to provide for jury trials in contempt cases was unconstitutional and void. Whether, therefore, the phrase, "judicial power" be or be not used, the weight of American authority is that the constitutional creation of a court impliedly calls into being the historical inherent power of the English courts to effectuate their own acts by contempt process.

The extent and nature of such power are well described in the following language of Chief Justice Wilmot, quoted from 3 Campbell's Lives of Chief Justices (p. 153), in the opinion in Carter *v.* Commonwealth (*supra*): —

[1] Art. III. Sec. 1.

[2] Carter *v.* Commonwealth, *supra.*

"The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the Supreme Court of Justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law; it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be found about it; it cannot, therefore, be said to invade the common law; it acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury; it is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other."

The inherent power of courts to punish for contempt has been recognized by the Supreme Court of the United States in such cases as U. S. *v.* Hudson,[1] Wells *v.* Commonwealth,[2] and *Ex parte* Robinson.[3] In the decision last named, however, an important distinction is noted. After referring to the general inherent power, Mr. Justice Field, in the opinion of the court, says with regard to the Circuit and District courts: "These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831" (of Congres, limiting and defining authority and jurisdiction in contempt proceedings) "is therefore, to them, the law specifying the cases in which summary punishment for contempt may be inflicted." Mr. Justice Field does not go further than to express a doubt whether the statutory authority of limitation would apply to the Supreme Court of the United States. But, according to the reasoning of the opinion, it is quite clear that, if the point had been directly at issue, it would have been directly held that the contempt powers of that tribunal are not subject to congressional revision. It is logical enough to hold that when a constitution, instead of itself creating courts, confers the power upon a legislative body, the congress or legislature may, as part of its act of creation, prescribe

[1] 7 Cranch, 32. [2] 21 Gratt. 503. [3] 19 Wall. 505.

what shall be the powers of its creatures as to contempt, as well as their jurisdiction and authority in other matters. According to such doctrine the Supreme Court of the United States, being called into being by the Constitution without intermediary legislation, has general, extra-statutory power to enforce its mandates by contempt process, and the same is true of courts constitutionally provided for in the various states. On the other hand, courts whose source of existence is a state statute would be subject to statutory restriction of contempt process in like manner as the federal Circuit and District courts.

The distinction indicated by Mr. Justice Field illustrates and emphasizes the point towards which our discussion has tended. The power of the courts to punish for contempt should be expressly granted and defined in the various constitutions. This is an essential function of a court as such. If it be subject to legislative supervision and curtailment, judiciaries may be reduced to the condition of mere advisory bodies, losing their independent status as coördinate departments of American government. It may be suggested that, as courts have shown the disposition and firmness to take care of themselves, as witness the cases above cited, constitutional provision on the subject is unnecessary. Fortunately there is much force in this contention. But it should be remembered that, because of the legislative tendency to transgress constitutional bounds and absorb the entire governmental power, there is a constant liability to unseemly friction between the judicial and legislative departments. That there is a widespread disposition to encroach upon judicial prerogatives is shown by the enactment of the statutes which in the decisions before referred to were pronounced non-authoritative by the courts of Arkansas, California, and Virginia respectively. Furthermore, in cases where the right to create courts is conferred upon legislatures, it may be well to define in advance in the constitution the contempt power which such tribunals shall possess when summoned into being. While it may be logical in theory, it may not be expedient to concede this authority to the legislature. It may be proper to commit to legislative discretion the formation of new courts of limited or general jurisdiction as the necessity for them arises. But when such tribunals are formed they should be endowed with the usual judicial power within their jurisdiction, without which they cannot be held to independent responsibility.

Moreover, in at least one of the states the courts have not evinced proper self-respect and self-assertion. In the great state

of New York "an evident effort was made to codify the law of contempt and bring it within definite and fixed rules." In People *ex rel.* Munsell *v.* Court of Oyer and Terminer,[1] it was laid down that, under statutory provisions discussed, "the common law right as to private contempts was preserved outside of and beyond the statute enumeration, and this was deemed safe and prudent, because, in cases affecting only private rights and wrongs done merely to the suitor, the court would be under little or no temptation to unduly strain or exercise their power." As to public contempts, "precise limitations were needed, and any shred or remnant of undefined common law power was deemed dangerous. And so the legislature decreed that 'every court of record shall have power to punish as for a criminal contempt persons guilty of either of the following acts *and no others*.' . . . So that, for the criminal contempt, we may look only to the statute, while for the private or civil contempt we may resort, if need be, to the common law." The opinion in this case contains no consideration or discussion of the power of the legislature to "codify the law of contempt." It is taken for granted, though the constitution of New York has provisions at least as appropriate as those of the Virginia constitution for vindicating the inherent power which other courts have held exists independently of, and even in spite of, legislation. The New York Court of Appeals has thus surrendered to a theory which could be logically carried to the extent of reducing the judiciary to the substantial status of a legislative committee. In New York, and in any other states where such anomalous view may have been sanctioned, the need of constitutional amendment, setting the courts on their proper legs, is imperative. And it is thought that enough has been said to show the desirability of some express constitutional regulation of the contempt function in all the states.

Thus far we have treated of efforts by legislature to weaken the right arm of the courts. The authority of the executive to paralyze it, through the pardoning power, is well settled and generally conceded. In the year 1841 one Dixon was adjudged guilty of contempt by the Circuit Court of the United States for the District of Mississippi, and a fine was imposed. Upon his application to the President of the United States for a pardon, the question of the President's authority in the premises was referred to the Attorney-General, Mr. Gilpin, who decided that the pardoning

[1] 101 N. Y. 245.

power extended to the case. He said in part: "If we adopt, as the Supreme Court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President. I am therefore of opinion that, should the President consider the facts such as to justify the exercise of his constitutional power to grant reprieves and pardons for offences against the United States,' there is nothing in the character of this offence which withdraws it from the general authority." With all due respect, we do not think that the precedent from Westminster Hall should be taken as controlling. This may seem inconsistent, as it has been argued above that, in determining the inherent power of the courts to punish for contempt, the law as it existed and was administered in Westminster Hall is to be followed. But the cases are widely different. American constitutions have not attempted to define the essentials of courts and their jurisdiction except by bodily adopting English models. The federal Constitution, after creating the Supreme Court and granting "judicial power" to it, and other tribunals to be established by Congress, confers their most important jurisdiction by the provision that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties." In ordinary parlance "equity" is an abstract term, connoting natural justice. As used in the Constitution "equity" is a concrete historical term signifying the system of jurisprudence administered by the English Court of Chancery. The vast and varied chancery powers administered by the federal courts to-day have for their basis the portion of the clause above quoted, extending the judicial power to cases in "equity." So, in the earliest constitution of New York, adopted in 1777, the existing judges of the Supreme Court and chancellor were by implication continued, a Court of Errors was created, after the model of the English House of Lords, and it was provided that, although the judges of the Supreme Court and chancellor shall be members of that tribunal, the former shall not have a voice in the actual determination of an appeal from a decree in "equity," and the latter shall not have a voice for the actual affirmance or reversal, on a question of law, of a judgment of the Supreme Court. What constituted "law" and what "equity," and what, therefore, were the respective characters and

jurisdictions of the Supreme Court and the Court of Chancery, were taken for granted. That is, the corresponding English institutions, with certain minor modifications, were adopted. In the successive constitutions of New York the same method of merely historical description and definition of courts and their jurisdiction is in the main followed. And the same is generally true of state constitutions as a class. It was the intention to transplant the English juridical entities in their substantial integrity. Without recognizing such intention constitutional judicial provisions would have been worse than inadequate; they would have been practically meaningless. It is therefore not only legitimate, but absolutely necessary, to go back to Westminster Hall for inherent judicial power in America.

With regard to American executive departments the facts are different. If there was any one English feature which emphatically the American people did not intend to take over in its entirety, it was that of the executive head of the state. Some of the prerogatives of the English king, such as the pardoning power, were indeed expressly conferred upon the President and the governors, but the method of mere historical description and definition was not followed. The various functions of the executive office were particularly enumerated and defined. The incumbent was granted large actual powers of government, but powers which were hedged about with restrictions. The American executive office was a new creation, not a similar institution bodily adopted. The contemplation was that it should constitute one of three independent and coördinate departments. It follows that, while it cannot be said that English precedents on the pardoning power have no relevancy, they are not finally determinative, and have no force other than as illustrative arguments.

It is argued that contempt of court is "an offence against the United States," or, in other words, a "public offence," and therefore is expressly covered by the constitutional power and pardon. Contempt is, of course, a *public* offence, but it is a special kind of public offence. It is, like any infraction of law, an offence against the whole people, but, in addition and more important, it is an offence against the dignity and a defiance of the authority of the court. With the conviction of and sentence for an ordinary crime the function of the court ceases; upon conviction of contempt the court has a direct and vital interest in the enforcement of the penalty.

These considerations are advanced as reasons why, in constru-

ing a flexible instrument of general terms and outlining a general policy, the courts should not have given the most literal and comprehensive effect to the clause granting the President the right to pardon. As far as contempt was concerned, the courts might have held that the universality of the language was necessarily modified by the circumstance that the judiciary was intended to be an independent, coördinate department, and that this could not be if the executive in its discretion could render the most essential judicial process practically abortive. However, these arguments can now be advanced only in favor of an express change in the law. The constitution of New York grants the power to pardon "for all offences except treason and cases of impeachment." The language in the constitutions as a class is very sweeping, and it has been held with great unanimity that an executive's power extends generally to convictions for contempt. The most recent case on the subject, citing many previous authorities, is Sharp *v.* State *ex rel.* Carson, in the Supreme Court of Tennessee (January, 1899).[1] In all of the reported adjudications, so far as I have been able to discover, the pardon has been granted to relieve against the definite punishment for a consummated contempt. In such a case the analogy to an ordinary "conviction" of an "offence against the state" is more plausible, than where a person is adjudged in contempt for refusing to obey an executory mandate — to give certain testimony, for instance, in say a quo warranto proceeding to determine the title to a public office — and sentenced to imprisonment until he complies with the court's order. Yet, in the latter instance, there would have to be the same kind of a "conviction" as in instances of consummated contempt, and, under the general principles laid down, an executive would have power to pardon in one case as well as in the other. This might result in rendering a judicial mandate relating to the future nugatory, and prevent the enforcement of perhaps an absolutely essential step for the administration of justice in a pending proceeding. The recognition of the power of pardon, therefore, tends to make the courts creatures of executive will or caprice, and, in like manner as the concession of the authority of the legislature to regulate contempt, to disturb the theoretical adjustment of the American governmental tripod.

An impressive object lesson of the possibilities of abuse of the executive function in question was afforded by an episode in the political history of the state of New York. In the year 1891 there

[1] 49 S. W. R. 752.

was a serious contest between the two great political parties for the control of the New York legislature. It was perceived immediately after the election that in the Senate the plurality either way would be very narrow. As to the candidates of three or four close districts, certain informalities in ballots used, and other alleged irregularities, were relied on to affect the canvass of votes and the consequent certificates of election to be given. These controversies were carried into the courts, and in Onondaga County one Thomas J. Welch, a member of the Board of County Canvassers, was adjudged guilty of contempt, and punishment imposed on him for disobedience of a judicial order relative to the canvassing of votes, and he was forthwith pardoned by the governor.[1] The governor was one of the most active and influential politicians, and the leader of his party in the state, and the disobedience of the court's order operated to his party's advantage. It scarcely seems that anything needs to be added to the bare statement of this case. It is true that the governor in his explanatory memorandum charges an abuse of judicial authority. If there were any grounds for this accusation they should have been laid before the assembly, to be considered on the question of impeaching the judge. As matter of fact, the imputation — one of the gravest that could be made if taken seriously — was not, and, under the circumstances, scarcely could have been, regarded as anything but a bit of the ordinary theatrical arraignment of the other side indulged in by partisans in the heat of a political campaign. Fortunately incidents such as the one described have been rare, but there is no good reason for relying upon the continuance of such good luck. It is perfectly possible for a governor to powerfully influence, if not actually control, the issue of close elections by nullifying the action of the courts. It is a truism that purity of the elective franchise is indispensable for the survival of democratic government; and how can such purity be preserved save through the courts? The writer has always advocated the extension of the jurisdiction of the courts even to cases of contested elections in legislatures and Congress. It is notorious that, under the present system, members are constantly seated by a strict party vote, under circumstances which would irredeemably blast the reputation and the official career of a judge who rendered a similar decision. Certainly, cases of disputed elections at the polls imperatively require for proper determination the tradi-

[1] Public Papers of Governor David B. Hill, 1891, p. 270.

tional non-partisanship, conscientious care and regard for settled principles of law, which in Ango-Saxon communities are associated with the judicial office. And a governor who evinces strong and brilliant executive qualities on great occasions may, with something of the same impunity as an average member of a legislature, use his official power to promote the advantage of his party and his own political future. His capabilities of mischief are greatly increased through his control of the action of the courts. His authority in this respect is an anomaly in American institutions. Under our theory of departmental checks and balances, a governor should no more be permitted to pardon upon conviction for contempt than the courts should be suffered to control executive acts by mandamus or injunction. To this general statement there is one exception. The constitutions grant to the President of the United States and the state governors the right to suspend the writ of habeas corpus when, in cases of rebellion or invasion, the public safety may require it. The wisdom of this contingent function of the executive is probably at the present day generally conceded. And pardon for commitment for contempt is an executive act of the same class. In both cases one of the three departments invades the province of another department. The same cricumstances of public exigency when *inter arma silent leges*, should be required to exist before the executive may override the judiciary by either method.

In his chapter on "State Constitutions" in The American Commonwealth, Mr. James Bryce refers to the tendency of constitutions to grow longer with each revision, larger because of popular distrust of ordinary legislators and the desire to curb them by organic law. Mr. Bryce cites a ridiculous instance in which a constitution goes even so far as to regulate the supply of stationery and fuel for the use of the legislature. In advocating — as is the purpose of the present paper — the constitutional regulation of contempt of court, the imputation is not incurred of seeking to lug ordinary legislation into the fundamental law. According to Mr. Bryce's analysis and classification, contempt of court falls within one of the scientifically proper parts of a "normal constitution," — "the frame of government, — *i. e.*, the names, functions, and powers of the executive officers, the legislative bodies, and the courts of justice." Nor would the proposed reform necessarily lead to great extension of length, or very elaborate and minute provision in constitutional articles devoted to the "frame of the

government." As to the character, jurisdiction, and function of courts, it would probably not be well to depart from the brief historical forms of definition which proved sufficient in the beginning, and have now been rendered practically definite by custom and adjudication. But, in addition, there should be expressly provided that courts of general jurisdiction shall have such powers to punish for contempt as were exercised by the courts of King's Bench and Chancery at the time of the Revolution, and that courts of limited jurisdiction shall have similar plenary powers when acting within their jurisdictions. Probably it would be well to expressly inhibit legislation on the subject of contempt, and certainly the executive should be disqualified from pardoning persons committed for contempt except under circumstances which would now authorize the suspension of the writ of habeas corpus. There should also be inserted a certain limitation upon the court's own powers. In cases of what has been termed "executory" contempt — the refusal to perform some interlocutory act, such as to testify in a legal proceeding — the court's power should be without limitation. In a contested will case in the city of New York several years ago, an old family servant, with a stoical loyalty that won her a great deal of sentimental admiration, spent several months in jail rather than answer questions affecting her employers or touching family secrets. It should not be within the power of a recalcitrant witness to clog the wheels of justice through the alternative of suffering a definite brief term of confinement. Interested parties would frequently be willing to offer a sufficient pecuniary indemnity for the temporary withdrawal from society. In one of the decisions above cited, as confirmatory proof of the general moderation and propriety with which the power to punish for contempt has been exercised, the court shows that only in two states has an attempt ever been made to constitutionally limit the inherent judicial power. Even if the judicial discretion were made absolute as to consummated as well as interlocutory contempt, it would not be abused except in exceptional cases. But to guard against cruel and unusual punishment in rare cases, as well as for completeness of legal form, constitutions should prescribe arbitrary limitations where the penalty imposed relates to a closed transaction, and thus is merely vindicative of the court's authority and dignity.

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